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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-586

WILLIAM S. NEIL, Warden,
Tennessee State Penitentiary,
Petitioner

v.

ARCHIE NATHANIEL BIGGERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

Mr. Biggers' rape conviction was affirmed by the Tennessee Supreme Court. *Biggers v. Tennessee*, 411 S.W. 2d 696 (1967) (Pet. Cert. App. I). This Court granted certiorari, 388 U.S. 909 (1967) (Pet. Cert. App. H); affirmed the judgment below by an equally divided vote, *Biggers v. Tennessee*, 390 U.S. 404 (1968) (Pet. Cert. App. G); and denied a petition to rehear; 390 U.S. 1037 (1968) (Pet. Cert. App. F). The United States District

Court for the Middle District of Tennessee granted a petition for the writ of habeas corpus in unreported orders (A. 32, A. 45) and the Sixth Circuit affirmed, *Biggers v. Neil*, 448 F.2d 91 (6th Cir. 1971) (Pet. Cert. App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered August 18, 1971. The petition for certiorari was timely filed October 27, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. Power to grant writ

"(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts

and any circuit judge within their respective jurisdictions . . .

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

§ 2244. Finality of Determination

"(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

Title 28, United States Code, further provides:

§ 2403. Intervention by United States; constitutional question

"In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall

permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

The 1954 rules of this Court were in effect at the time the original writ of certiorari was granted, June 12, 1967. Rule 23, The Petition for Certiorari, remained unchanged in pertinent part by the 1967 amended rules, and was as follows:

"1. The petition for writ of certiorari shall contain in the order here indicated—

"(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Rule 33

"(2) (b) In any proceeding in whatever court arising wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question and the United States or any agency, officer or employee thereof is not a party, all initial pleadings, motions or papers in this court shall recite that 28 U.S.C., § 2403 may be applicable and shall be served upon the Solicitor General, Department of Justice, Washington, D. C. 20530. In proceedings from any court of the United States as defined by 28 U.S.C., § 451, such initial pleading, motion or paper shall state whether

or not any such court has, pursuant to 28 U.S.C., § 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress was drawn in question."

QUESTIONS PRESENTED

I. WHETHER AN AFFIRMANCE BY THE SUPREME COURT IN AN EQUALLY DIVIDED OPINION AFFIRMING A STATE CONVICTION ACTS AS RES JUDICATA AS TO THE SAME ISSUES RAISED IN A SUBSEQUENT PETITION FOR A WRIT OF HABEAS CORPUS IN FEDERAL COURT.

II. WHETHER RESPONDENT WAS DENIED A FAIR TRIAL AS A RESULT OF THE USE OF IDENTIFICATION EVIDENCE ALLEGEDLY THE BY-PRODUCT OF AN UNCONSTITUTIONAL PROCEDURE.

STATEMENT OF THE CASE

1. *History of the Litigation*

Respondent Biggers was identified by Mrs. Margaret Beamer of Nashville as the man who raped her January 22, 1965. The identification was made at the Nashville police station on August 17, 1965, and Biggers was charged with rape.

Biggers was convicted after a trial by jury held November 29–December 3, 1965. His conviction was affirmed by the Tennessee Supreme Court in *Biggers v. Tennessee*, 219 Tenn. 553, 411 S.W.2d 696 (1967) (Pet. Cert. A-68).

This Court granted certiorari, 388 U.S. 909 (1967) (Pet. Cert. A-67) and affirmed by an equally divided Court 4-4 (Douglas, J., dissenting) (Marshall, J., not participating),

390 U.S. 404 (1968) (Pet. Cert. A-61). A petition to rehear was denied, 390 U.S. 1037 (Pet. Cert. A-60).

The question upon which certiorari had been granted in the 1967 Term case as stated in that earlier Application for Certiorari was:

> "The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months [the exact time was actually six months, twenty-six days] earlier for voice identification by the prosecutrix."
>
> "Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a lineup, or with any other means to assure an objective, impartial identification of his voice by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights?" (Pet. Cert. A-8)

The briefs and transcript of record filed in that earlier case may be found in Volume 51, Transcripts of Records and File Copies of Briefs, Nos. 232-237, Supreme Court of the United States, October Term 1967. A transcript of the oral argument was submitted as Appendix J to the present Petition for Certiorari. The documents needed for consideration of the case are the Transcripts of Record and Briefs from the earlier case, No. 237, O.T. 1967[1] (one copy in Supreme Court Library and one copy of Transcript of Record an exhibit filed in this proceeding; cited as R. ___), Petition for Certiorari (containing earlier opinions and the Sixth Circuit opinion), the transcript of oral argument and the Joint Appendix (cited as A. ___).

[1] Petitioner's motion to use the original record in Biggers v. Tennessee, No. 237, O.T. 1967, was granted, 405 U.S. 954 (1972).

After rehearing was denied in April, 1968, a petition for writ of habeas corpus was filed in July, 1968, in the United States District Court for the Middle District of Tennessee, Nashville Division (A. 6) alleging that the identification procedures violated the Due Process Clause of the Fourteenth Amendment.

The District Judge, Hon. William E. Miller,[2] denied a motion to dismiss (A. 17), saying this Court "did not settle the merits of this case, and affirmed only through an equal split in opinion." (A. 19).

Affidavits were submitted by Petitioner (A. 24-A. 30), and a limited evidentiary hearing was ordered. (A. 31). After the Court heard testimony, it ordered a new trial without the stationhouse identification. (A. 32). A motion to reconsider based on the earlier adjudication by this Court was overruled. (A. 45).

The Sixth Circuit affirmed in an opinion by Judge Edwards with the concurrence of Judge McRee, with Judge Brooks dissenting. (Pet. Cert. A-1). This Court granted certiorari, 405 U.S. 954 (Feb. 28, 1972). The Solicitor General has not indicated whether he wishes to ask the Court for permission to intervene pursuant to 28 U.S.C. § 2403 to defend the constitutionaltiy of 28 U.S.C. § 2244(c).

2. *The State's Case Against Biggers*[3]

A. The Crime

Mrs. Margaret Beamer, 39, the mother of five children, returned to her Nashville home Friday afternoon, January 22, 1965, from her job as an LPN at Hubbard Hospital, where she had worked fifteen years.

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[2] Judge Miller is a member of the United States Court of Appeals for the Sixth Circuit.

[3] The Account which follows is stated as favorable to the theory of the State as is supported by the record.

Her husband, a law student attending night classes on Mondays and Fridays (R. 27), left the house to get some law books about 9:00 p.m., leaving her alone in the house with her 12 year old daughter and 6 year old son.

The rapist, who apparently had been looking down into the house from the railroad tracks outside, entered the house. (R. 14). There is a hallway near the confluence of two bedrooms, a living room, and the kitchen. (R. 9, 12, 13, 21, 22, 33, 34, 83, 87-93). Although the hallway itself was unlighted (R. 12), there was "light in the living room, light in the bedroom and light in [Mrs. Beamer's] bedroom." (R. 12). The lighting in her house was "ordinary" and "well-lighted." (R. 14).

The intruder stepped out of the dark kitchen, grabbed Mrs. Beamer in the hallway and grappled her to the floor. (R. 9). Her screams brought her twelve year old daughter, Francesca into the hallway; but the rapist, brandishing a large shiny knife, ordered Mrs. Beamer to tell her daughter to go back into her bedroom, which the daughter did.[4]

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[4] The defense has discounted the daughter's testimony, but this 12 year old (age 13 at trial), although unable to identify Biggers, said "he was tall, and he was kind of big and dark" (R. 83), "Negro," (R. 83), and "had on a short-sleeved shirt." (R. 83) The rapist's voice made a particular impression on her. She described it as "a young voice" (R. 84) and distinguished it from the voice of the defense attorney, whom she said she supposed had "an old voice." (R. 97) She noted the rapist had a silver knife, did not have on a hat, and thought his short-sleeved shirt closed at the neck (R. 91).

Her testimony weakens the contention, at least as to this witness, that State authorities sought to overreach the defendant with an impermissibly suggestive identification practice.

The daughter noted this about the assailant: 1) tall, 2) big, 3) dark, 4) Negro, 5) wore short-sleeved shirt closed at the neck, 6) had no hat, and 7) had young voice. The inference is the voice did not fit for the size of the man. This was a matter for the jury. Even defense witnesses noted what a large person he was to be so young. Biggers testified he was 5'9" to 6' and weighed 187-200 pounds (R. 112). His stepfather, a defense witness, said Biggers "never did go anywhere" because "he said he was overlarge for his age." (R. 127) A picture of the defendant (never introduced into evidence, although made an exhibit) is in the record at page 197.

During the scuffle on the floor of the hallway, Mrs. Beamer was "looking up in his face." (R. 14)[5]. She said there was no light in the kitchen (R. 33) and was asked, "So you couldn't have seen him then? Answer: "Yes, I could see him, when I looked up in his face." Question: "In the dark?" Answer: "He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was." (R. 33).

Mrs. Beamer and her assailant left the "well-lighted" house[6] (R. 14) through the dark kitchen and went out-

[5] At this point the District Attorney asked if she were "able to describe this man, other than seeing a butcher knife." She answered, "No, other than I remember the blade being shiny." (R. 14) Here again, the State argues the witness was taking pains not to overreach the defendant and was testifying without malice or vindictiveness.

The tone and timbre of the witnesses, their vindictiveness or lack thereof, and the confusion as to whether Mrs. Beamer made an in-court identification come through cold on the printed record. Appellate lawyers and judges can never get the feel of the case which the jury gets, which is all the more reason why jury verdicts should be overturned cautiously.

On cross-examination, the defense attorney asked the victim, "You could see? No light? And you could see him and know him then?" and Mrs. Beamer answered, "Yes." (R. 34).

[6] The 12 year old daughter said there was an opening from the living room into the hall. The lamp "was next to the chair that was next to the door that leads outside." (R. 89) The defense attorney then asked: In which corner—northwest or northeast? The witness said northwest. Apparently this was illustrated to the jury (Defense Atty: "In this corner over here... or in this corner over here...?" R. 89), but reading the cold record, one can't tell whether the lamp was by the chair next to the hall where Mrs. Beamer was thrown to the floor or whether the lamp was somewhere else. (R. 89) "Northwest corner" (R. 89) means nothing. It makes a big difference, however, because it corroborates her answer of "Yes" to the question on cross-examination: "You could see? No light? You could see him and know him?" (R. 34).

doors. She testified, "There was a moonlight night, with a few clouds. And street lights on down on the street, not on the track. But it [the lights] did not extend up over the track. Taller than the track was." (R. 13). A full moon was shining brightly. (R. 34) Neon street lights, called Ben West[7] lights, *hung over the tracks* (R. 13). illuminating the way as they walked along the tracks. One or two blocks away from Mrs. Beamer's house (R. 33), in a little wooded area off the tracks (R. 10), the defendant held a butcher knife over her, and standing over her with the knife lay down with her cheek to cheek having intercourse for 15 minutes. (R. 28). After penetrating her sexual organs and reaching a climax (R. 60), Biggers let her dress and go back up the railroad track. (R. 10, 11). Biggers "went off in the opposite direction, running." (R. 10).

Mrs. Beamer said that when Biggers raped her he had on "a short-sleeved green shirt. As to the type of trousers on, all I can remember, they were dark. I don't know what color."[8] (R. 29).

Returning home and finding her children safe, she called the police (R. 15) who carried her to the hospital. (R. 44). The physician who examined her testified at the trial she had had intercourse during the previous three hours. (R. 63)

During the following months the police showed her thirty to forty photographs both at home and the police station

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[7] The name of a former Nashville mayor.

[8] A witness called by the defense to testify as to Biggers' good character, Miss Nina Carter, was a bookkeeper at Meharry Medical College, and acquainted with Mrs. Beamer and her work as an LPN. She testified Mrs. Beamer was of good character: "Well, I'll say I don't know anything wrong about her." (R. 144) There was no evidence introduced that her testimony should not be entitled to full faith and credit in a court of law.

(R. 15, 39) but only one even had features like the rapist. (R. 15). Then, six months and twenty-six days after her attack, the Nashville Police solved the case.

B. The Arrest

The trial testimony concerning the arrest and subsequent developments, such as Biggers being declared incorrigible by the Juvenile Court, make sense only when supplemented with the affidavits of Biggers, his mother, and his attorney filed at the federal habeas corpus hearing. (A. 24-30). When these are combined, the State's case is as follows:

Biggers, while receiving emergency treatment at Hubbard Hospital about 10:30 p.m. August 16, 1965, was questioned about a cut arm. (A. 26). The attempted rape of Mrs. Carrie D. Silverman, a resident of the Bordeaux area of Nashville, was also being investigated at this time. (A. 29). Biggers was taken to the home of Mrs. Silverman in Bordeaux (R. 51; A. 29) where, according to his affidavit (A. 29) "Mrs. Silverman attempted but could not identify [me]." However, Officer Cathey testified at the trial out of the presence of the jury, that on the case that "happened on Cliff Drive [the Silverman attempted rape] . . . we had a positive identification, you see." (R. 55). The next morning, August 17, the Juvenile Court declared Biggers incorrigible because of the Silverman attempted rape and bound him over for trial as an adult. (R. 52, 55; A. 28; Biggers' mother in her affidavit said she was told by the police that her son was "identified by a lady in Bordeaux on the charge of assault with intent to ravish and also by a Negro woman on a charge of rape and that he could not be released.")

Establishing the "positive identification" (R. 55) of Biggers in the Silverman assault took from 10:30 p.m. (A. 29) until midnight or shortly thereafter. Biggers was arrested about 1:30 a.m. (R. 51) and lodged overnight with the Juvenile Court night attendant for safekeeing. (A. 30).

On the morning of August 17, he was declared incorrigible (R. 52) and taken to the police station by officers Cathey and Hamm, working under the direction of Lt. McDaniel. (R. 52). Officers Smith and Berry brought Mrs. Beamer to headquarters. (R. 39). The stage was thus set for the confrontation between Mrs. Beamer and the defendant.

C. *The Identification*

The officers who picked Mrs. Beamer up at her home the morning of August 16, stated, "We had a suspect we would like her to look at and see if she could identify him." (R. 40). Defense counsel tried to maximize the suggestibility of the witness, but she stated, "I identified the suspect. They didn't point him out." [9]

The circumstances of the police station identification were as follows:

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[9] Although no notice has been taken of this, Mrs. Beamer perhaps saw Biggers first at the Juvenile Court prior to the stationhouse identification. Biggers at one point testified: Q. "Where were you when you first saw Mrs. Beamer?" A. "At the Juvenile." Q. "At Juvenile Court? What day was that?" A. "Oh, I don't really know." (R. 107) At another place in the record, Mrs. Beamer on cross-examination mentioned she had testified at the juvenile court (R. 24). Then apparently speaking of the police station identification, although this is unclear, defense counsel asked: "And that was the second time you were allowed to see him?" (R. 24) Mrs. Beamer answered: "That is correct." (R. 25).

At the police station, Mrs. Beamer, with another woman whose identity the record does not reveal, waited to identify Biggers in a room off a long hallway. (R. 66, 73). Biggers' testimony was: "I was in a room all by myself with another detective, R. B. Owen, and Lt. —I think it was Sgt. Woods come in there and got me, and carried me to to the room where she [Mrs. Beamer] was. And there was another woman with her. And I was facing her, just like I am facing this speaker right here, and she looked at me, and then she told him to tell me to say, —uh— Stop, or I'll kill you. Something like that. And Woods told me to say it. And I hesitated for a minute, and then he said, Say it, Son, and I said it. And then she nodded her head like this." (R. 107-108).

Three policemen testified Mrs. Beamer identified the defendant. Detective Smith remembered she said, "That is the man" without ever hearing the defendant speak. (R. 40). Lt. McDaniel said she identified Biggers without any hesitation: "Mrs. Beamer was in the office directly across from mine, and we had the defendant come and stand—walk up the hall and then come and—come back and stand in front of the room, which, without any hesitation, she——". (R. 66). When asked what happened when the defendant was asked to talk, the officer said: "Right at that time when she iden-, saw him, she asked us to have him repeat a question which he repeated. That, and she also by voice, yes, sir." (R. 66). Lt. McDaniel was asked, "You brought her down to identify that one subject?" and he answered, "That's right. He walked by the door opening—her—where she was sitting the door was open, which another lady was sitting in the office also, ——." (R. 73).

The third police witness who testified concerning the identification[10] was Detective Bailey. He unequivocally said Mrs. Beamer identified Biggers, not by voice, but "by looking at him, and said he was the one." (R. 79). Detective Bailey answered, "Yes, sir," when asked, "Had she identified him before he was ever asked to talk?"

Mrs. Beamer was asked at trial, "What physical characteristics, if any, caused you to be able to identify him?" She replied, "First of all, —uh—his size, —next I could remember his voice." (R. 17)[11]. She testified generally and positively that she identified Biggers at the police station on August 17. (R. 16-19). The physical characteristics Mrs. Beamer testified to were Biggers' face: "No, when he placed his face against mine—that was another thing, his skin was rather smooth, as, you know, someone that didn't shave." (R. 18). [Biggers on cross-examination was asked by the District Attorney: "You haven't started shaving yet, have you?" A. "No, sir" (R. 112)]; his size: "Well, as I said, the size. He had—well at the time he raped me, his shirt was unfastened, and he had a large kind of flabby abdomen and breasts." "Kind of flabby big breasts. As I say, the abdomen was fat." (R. 19); his hair ("Sort of bushy" R. 18); and lastly, his voice.[12]

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[10] Only two other policemen testified. Officer Black's testimony concerned events long before the Biggers arrest. (R. 103-106) Officer Cathey was asked, "Were you, yourself, present at any time when anyone attempted to make an identification of Mr. Biggers?" and answered, "Well, I was in and out of the room, General. I cannot say—as far as being there." (R. 48).

[11] All the witnesses (three policemen and Mrs. Beamer) said she first identified the defendant by his appearance and then later he was asked by Mrs. Beamer to speak the words of the rapist. Even Biggers' testimony is not to the contrary.

[12] She said it was a "medium-pitched voice of a young man not an old man, not mature." Q. "Was it loud, or soft?" A. "He talked soft." (R. 17). This is apparently an accurate description to the extent that such information can be gleaned from a printed record. The attorney for Biggers opened his examination of Biggers as follows: Q. "Now, talk so I can hear you." A. "Yes, sir." Q. "Now, you are talking o. k." (R. 104).

D. The Trial

The State brought the defendant to trial on November 29, 1965, following the arrest on August 17. He was represented by two retained attorneys. The trial began on Monday, November 29, and concluded Friday, December 3. The jury found the defendant guilty and recommended a sentence of twenty years which was imposed by the Court. In accordance with Tennessee law he was sentenced to the State Vocational Training School for Boys and upon reaching his majority was transferred to the Tennessee State Prison. (R. 187).

The State's proof was as heretofore detailed, except there was no mention made of the Silverman rape attempt.

The defendant testified and denied the crime, saying he could not remember his activities the night of January 22. Six witnesses testified to his good character. The defense sought by the testimony of the defendant's mother, stepfather, and acquaintances to establish that defendant was unlikely to have committed the crime because no one could get him to leave his home.

The defendant's witnesses sketched a portrait of a maladjusted child living as a recluse. His mother said, "He just stayed at home. I couldn't get him to leave home. ... I just couldn't get him to leave, no matter what we did. We tried, but I just couldn't get him out." (R. 117). His stepfather said Biggers "stayed at home of [sic] the time cause we couldn't get him to go anywhere." (R. 126). When asked why, he said, "Well, at first he said—uh—his breath smelled. He—uh—and he also said he was overlarge for his age." (R. 127). Mrs. Leftwich, a neighbor, testified:

"Well, the only thing that I can say is that when I go into the home, usually he would meet me at the door, or his mother would tell him to come to the door, and he always met me and spoke, and sometimes, after he would speak he would go to the back, and I would say, Nathaniel, what's happening? I'd say, What's happening why you are leaving the door, he said, Mrs. Daniel, —that's my career name is Daniel—he says that I'm so big, I'm ashamed of myself, and I said, But you're handsome. You're tall and handsome. A lot of men would desire to be the height and the size of you, that you are. And so, from then on, he always would talk to me." (R. 155).

Another defense witness, a neighbor, Mrs. McCain, gave this testimony:

"Well, I hadn't seen this child right then, but a few days later I began to see Nathaniel Biggers, and of course by him staying in the house all day like he did, I wondered about him, and I began to watch to see if he'd stay in when his mother would tell him to. Well, I never would see him come out doors for he looked at television all day long, and occasionally I would see him look out the window, all day. That went on for about a year, and we began to worry about him and wonder what was wrong with a boy that large staying in, because she left, she'd say, Keep the doors locked, but every time anybody knocked on the door over there, naturally we'd see it, because we was right on the front, my husband's bedroom and mine, right on the front. And we'd look out to see what was happening. He wouldn't come to the door but shortly after the person would leave, he would come to the door and look out." (R. 161-162).

Mrs. Alsup, a neighbor called as a defense witness, had this to say about the defendant:

"And they told me about this boy [Biggers]. Well I got concerned about him, and he worried me cause all he would do was stay at home, and come to the door and look out. If anyone come up, he wouldn't answer the door, then he'd wait till they would leave, and then he would come to the door. And answer the door. And I said, Well, why couldn't he come then? And it worried me—but he was always at home, and it worried me why did he stay at home so much, and not get out and carouse up and down the street like the rest of the boys. And I would lay there and fuss, and I worried and I worried and I worried about him, till it just made me sick, and the Doctor said, Well, you're just going to have to quit worrying about that boy. I said, How can I? I said, He's a boy, and it worries me. Because——

"Q Was he——

"A He didn't go anywhere night or day.

"Q Uh-huh? Uh-huh?

"A And it was enough to make you concerned about him.

"Q Did you discuss it with his mother?

"A No. I—I—I wasn't able to get out.

"Q Uh-huh?

"A But I said when I did get out, I said, I am sure going out somewhere. And why does she keep him housed up like that? All the time?" (R. 169-170).

The State established on cross-examination of the defendant's stepfather that the defendant's home was only two blocks away from White's Lunch Room. (R. 131, 132, 136) Mrs. Beamer, after being raped, called the police using the phone at White's Lunch Room. (R.

15, 23). She said: "I went to White [sic] Lunch Room, and it's about three or four doors down—in fact, it's two doors down from where I was—my house—." (R. 23).

A question claimed by some not to be fully answered in the trial transcript is whether Mrs. Beamer made an in-courtroom identification. The District Attorney asked her, "Are you telling this Jury today that you have any doubt about this? Or do you have any doubt about this?" Answer: "No, I don't have any doubt." (R. 17). Later the trial judge asked Mrs. Beamer, "Is there any doubt in your mind today?" After an objection was made by defense counsel, the judge asked her again: "All right. Is there any doubt in your mind today?" Mrs. Beamer said, "No, there's no doubt." (R. 19).

The State contended when this case was before this Court previously that Mrs. Beamer made an in-courtroom identification. Mr. Justice Douglas in his dissent disagreed, saying, "The inference to be drawn is that Mrs. Beamer had no current doubt as to the correctness of her previous identification of petitioner at the police station." 390 U.S. at 406 n. 2.

E. The Federal Habeas Corpus Evidentiary Hearing

After a petition for rehearing was denied April 22, 1968, 390 U.S. 1037, a petition for the federal writ of habeas corpus was filed July 1, 1968, alleging, *inter alia*, an improper stationhouse identification of Biggers. (A. 6-16).

The Court ordered a limited evidentiary hearing which amplified the available information a great deal.[13] One

[13] The order read: "(T)he Court desires open court testimony on the following matters: the nature of the 'show-up' identification process as opposed to the 'line-up' identification process, and why the former process was employed in the instant case; and, the general reliability of voice identifi-

(Continued on following page)

policeman's notes said that Mrs. Beamer described her assailant as 6' tall, 180 pounds, dark hair, with a medium to dark brown complexion.[14] (A. 74). Mrs. Beamer remembered that at the time of the rape she described her assailant in this manner:

1. Teenager
2. Age 16-18
3. 180-200 pounds
4. Dark brown complexion
5. Bushy hair but not like an Afro
6. Height 5'10" to 6'
7. Smooth face of someone who didn't shave much
8. Voice of a teenager before he reaches adulthood and the voice gets deep. (A. 124-125).

Between the assault on January 22 and the identification of Biggers on August 17 the police brought individuals and pictures to Mrs. Beamer's home for identification, and she attended several police station lineups containing four or five men dressed alike. (A. 81, 83, 124, 130).

On the evening of August 16, 1965, while Biggers was receiving care at Hubbard Hospital for a cut arm (affidavits A. 24-30; testimony A. 76), Mrs. Silverman, the

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(Continued from preceding page)

cation procedures, and their relative importance compared with other methods of identification in linking the petitioner to the offense alleged in the instant action."

[14] Both the State's attorney and Biggers' attorney frustrated Judge Miller's efforts to elicit from the police witness what description she had given of her assailant. The State's attorney misunderstood what Judge Miller was asking the witness (A. 87) and then again interrupted an answer to advise the Court that Mrs. Beamer was to be a witness, which was irrelevant (A. 87). Biggers' attorney advised the Court that Mrs. Beamer did not testify about the assailant's dress (A. 87), here again getting off the subject. Actually Mrs. Beamer said the rapist wore a green shirt and dark trousers (R. 29).

victim of a rape attempt, was a patient at Baptist Hospital. (A. 76). Biggers, who had become a suspect, took the officers to the scene of the Silverman attempted rape and reenacted the crime.[15] He was held that night on this crime under a technical charge of "loitering."[16] (A. 81).

The next morning, August 17, two officers brought Mrs. Beamer to police headquarters to look at a suspect.[17] (A. 129). Biggers was in a room used by Dr. Core, and Mrs. Beamer was in an office down the hall later used by the sergeant of detective. (A. 78). Two black policemen in plain clothes

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15 Biggers was charged but never tried on this attempted rape. In his affidavit, he denies everything. The prosecution for the Silverman attempted rape was dropped after Biggers' conviction and twenty year sentence in this case. It is important to remember that the trial jury heard only about the rape of Mrs. Beamer. The order granting the limited federal habeas hearing precluded the state from introducing any evidence about the Silverman assault. For the text of that order see n. 13 supra.

16 Formal charges of attempted rape (Mrs. Silverman) (A. 77) and rape (Mrs. Beamer) were subsequently placed before the Juvenile Court. (R. 52, 55) Biggers' counsel seems to imply the police acted improperly by charging him with "loitering." If it is necessary to detail a 16 year old until he can be presented to a Juvenile Judge the following day, it would seem better to hold him on a technical charge of "loitering" than on a charge of "attempted rape" which would be a blot on his record forever, even if unfounded.

17 Apparently there is a typographical error in the transcript. Mrs. Beamer said (A. 123): "I was told they had some suspects (sic), and if I recognized this suspect, just to look at him and see if I could recognize him . . ." Biggers' counsel apparently understood her to say "suspect" (singular) for on cross-examination he asked: "Now you said that the officers mentioned that they had a suspect that they wanted you to see."

This is the only difference, if indeed this be a difference, between Mrs. Beamer's trial testimony and habeas testimony that the State can find. Everything else, except as pertains to the Silverman rape, is uncontroverted (including the testimony of the police officers, discussed post).

The trial judge incorrectly said in his Order of April 17, 1970 (A. 34): "As to what transpired at the show-up, there is some conflict between the testimony given by Mrs. Beamer at the trial and that given by her at the evidentiary hearing held in this court on October 30, 1969.)

(Sgt. Woods and Officer Bailey) led Biggers past the door where Mrs. Beamer was seated with an unidentified woman and the policeman in charge, Captain McDaniel. (A. 79-80). Mrs. Beamer immediately recognized Biggers as her rapist without ever having heard him speak. (A. 80, 123, 124, 129, 134). After identifying him by his appearance, she asked the officers to have him repeat the words, "Shut up or I'll kill you" (A. 80, 123, 124, 129, 133), which made her even more certain in her identification. (A. 129). The foregoing proof given at the habeas corpus hearing was uncontroverted. Biggers testified at the trial concerning the confrontation, and his testimony is not contradictory. (R. 108).

Other uncontroverted evidence offered at the habeas corpus hearing was that Captain McDaniel attempted to arrange a lineup. On an average day there are 100 people in the Metro jail, an adult facility, and a maximum of 50 boys and girls at the juvenile jail. (A. 69). Captain McDaniel conferred with Judge Tatum of the Juvenile Court but was unable to find anyone of Biggers' stature. (A. 70). He telephoned his superior officer at the jail likewise without results. (A. 75). Captain McDaniel found the adults at the jail comparable in size with Biggers were too old, and the juveniles in the Juvenile Detention Center were too small. (A. 72).

Mrs. Beamer said she positively identified Biggers at the trial. (A. 122). She had no doubt in her mind at the time of the trial. (A. 123). When asked what she meant at the trial when she said she had no doubt, she said, "I had no doubt because I was sure that this is the one." (A. 127). She said, "He had the same face, this is the same man that attacked me, because he looks the same, the same face, the same build, the same color, the same hair, and the same age when I viewed him." (A. 128). On

cross-examination when asked if she had identified Biggers at the trial, she said, "I can't recall whether I pointed my finger, but I was asked if that was the man, and if that is him over there, and there was some way that I indicated that Mr. Biggers was the individual." (A. 131).

Dr. Irwin Pollock, a psychology professor at the University of Michigan with special expertise in auditory perception, testified as Biggers' expert witness. From his study of the record in this Court in 1968 in *Biggers v. Tennessee*, he found many factors he thought prejudicial, among them:

a) one to one confrontation (A. 92)

b) lapse of time (A. 92)

c) Defendant was identified as a suspect to Mrs. Beamer (A. 93)

d) Defendant was requested to utter a specific statement, "Shut up or I'll kill you," which had emotional connotations (A. 93)

e) Mrs. Beamer was surrounded by police officers perhaps intent "in finding for a particular suspect" (A. 93)

Dr. Pollock characterized the procedure used as a yes-no procedure which he called inferior to a "forced choice" procedure (A. 93) and noted that auditory memory is not as good as visual memory. (A. 96). Dr. Pollock admitted on cross-examination that he had assumed that Mrs. Beamer's prime mode of identification had been auditory. (A. 103).

Biggers' mother testified the police took her son away from the hospital the night of August 16 and kept him until she saw him at Juvenile Court at three or four o'clock the next morning. (A. 120). At about 8:00 a.m., she retained an attorney. (A. 121).

The District Judge took the case under advisement in November and the following April ordered a new trial "unaffected by Mrs. Beamer's stationhouse identification and the testimony of the police officers who were present when it took place," quoting the dissent of Mr. Justice Douglas, *Biggers v. Tennessee*, 390 U.S. 404, 409 (1968). (A. 32-43).

In another order entered a few weeks later, the Court overruled the State's contention that the 4-4 affirmance by this Court was res judicata. (A. 45-51).

SUMMARY OF ARGUMENT

1. The 4-4 Affirmance

This Court in 1968 gave plenary consideration to the stationhouse identification. The affirmance, even though by a divided Court, is res judicata as between the parties as to the same issue affirmed by the Court.

The consideration this Court gave in 1968 to the stationhouse identification is a factual question. The briefs and the transcript of oral argument show that all aspects of the identification were fully considered. The certiorari grant did not limit the question to voice identification, particularly in view of Rule 23 of this Court which says that a statement of a question presented is deemed to include every subsidiary question fairly comprised therein.

In 1966 Congress enacted 28 U.S.C. § 2244(c). The statute provides:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

The statute bars any relief for Biggers through federal habeas corpus as to the stationhouse identification.

2. The Stationhouse Identification

The District Court made erroneous findings of fact in reading the 1965 trial transcript. These findings are plain error and do not support an order granting a new trial excluding the stationhouse identification. Both lower courts' assays of the facts are demonstrably inaccurate in several critical areas. The State's evidence at the federal habeas corpus hearing, though uncontradicted, was disregarded and was even said to conflict with the 1965 trial record when a reading of the two shows they are complimentary, not conflicting.

The identification below was less suggestive than the ones approved in *Coleman v. Alabama*, 399 U.S. 1 (1970) and *Stovall v. Denno*, 388 U.S. 293 (1967).

ARGUMENT

1. Biggers' previous conviction, affirmed by this Court by an equally divided vote, barred further review of the stationhouse identification in a federal habeas corpus hearing.

A. The Statute.

Title 28, U.S.C. §2244(c) (Supp. IV, 1969), *amending* 28 U.S.C. §2244 (1964) provides:

"(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted

denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

The Senate Report on this amendment says:

"The new subsection (c) provides that when a habeas corpus proceeding is brought in behalf of a person in custody under a judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari brought by the prisoner will be conclusive as to all issues of fact and law concerning an alleged denial of a Federal right that were actually adjudicated by the Supreme Court. There is an exception to the conclusiveness of this presumption if the applicant for the writ pleads and proves the existence of a materially controlling fact that did not appear in the record of the proceeding before the Supreme Court and that he, the applicant, could not have caused to appear in such a record by the exercise of reasonable diligence. This subsection is intended to give a conclusive presumption only to actual adjudications of Federal rights, by the Supreme Court, and not to give such a presumption to mere denials of writs of certiorari.

"The purpose of these new subsections is to add to section 2244 of Title 28, United States Code, provisions for a qualified application of the doctrine of res judicata."

S. Rep. No. 1797, 89th Cong., 2d Sess., 1966 U.S. Code Cong. and Ad. News 3663, 3664.

The Habeas Corpus Committee, chaired by Senior Circuit Judge Orie L. Phillips of the Tenth Circuit, was composed of federal judges who considered these recommendations to be consistent with this Court's habeas corpus rulings. Judge Phillips referred to the measure in a letter to Senator Joseph D. Tydings, September 24, 1966, in S. Rep. No. 1797, 89th Cong., 2d Sess. 4 (1966), as "a qualified application of the doctrine of res judicata."

In a case involving a similar res judicata question, this Court affirmed a New York conviction for casting contempt on the American flag by an equally divided Court in *Radich v. New York*, 401 U.S. 531 (1971) (Mr. Justice Douglas not participating). The District Court for the Southern District of New York denied federal habeas corpus relief, relying on § 2244(c). *United States ex rel. Radich v. Criminal Court of New York*, ___ F. Supp. ___ (S.D.N.Y. No. 71-2738, decided December 3, 1971). The Second Circuit reversed in a 2-1 decision, ___ F.2d ___ (2nd Cir. No. 71-2185, decided April 26, 1972), *certiorari pending sub nom. Ross v. Radich* (O.T. 1971 No. 71-1510).

The dissent of Judge Mulligan of the Second Circuit is reprinted as Appendix A to this brief.

The failure of the Sixth Circuit to even mention § 2244(c) much less apply it in this case has been recently criticized. See note, 40 U. Cin. L. Rev. 189 (1971).[18]

In a situation analogous to this case, after granting certiorari, briefing and oral argument, this Court dis-

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18 This Note which is also critical of the Sixth Circuit in **Biggers** for not following Supreme Court case law is reproduced as Appendix B to this brief.

missed the writ as improvidently granted in *Duncan v. Tennessee*, 405 U.S. 127 (1972) (3 Justices dissenting). It is clear from both the per curiam order and the dissenting opinion that this Court felt there was no violation of the constitutional guarantee against double jeopardy. However, the rule of *Biggers*, as affirmed by the Sixth Circuit, would allow a federal district court to examine de novo the double jeopardy issue just as if this Court had not given it the fullest consideration when the case was initially before the Court. Biggers never alleged any "material and controlling fact" in the lower court that was not in the record before this Court when the case was heard initially in 1967.

There are limits to the federal courts' broad powers of habeas corpus jurisdiction over state judgments. See, *e.g.* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335 (1952); Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 63 (1956): "[I]t is conventionally assumed that perpetuation of federal district court habeas corpus jurisdiction is not constitutionally required, on the theory that Congress is free to give what items of federal jurisdiction it chooses to courts which, unlike the Supreme Court, exist only by congressional sufferage." 66 Yale L.J., supra at 63; and note, *Remedies against the United States and its Officials*, 70 Harv. L. Rev. 827, 864-875 (1957).

Suppose Congress took away habeas corpus jurisdiction over state prisoners from all lower courts and reposed it solely in this Court. This Court has already considered *Biggers* and divided evenly on it 4 to 4. Would Biggers be allowed to relitigate this same contention again whenever new Justices come to the Court? Logic dictates not.

The District Judge mentioned the "fortuitous circumstance" of this Court being evenly divided, thus the

prisoner's relief being denied. Suppose in a federal habeas corpus case (after all the state judges had found no federal constitutional error) the United States District Judge finds error and grants the writ. The appellate court reverses 2 to 1. The prisoner will be returned to jail, assuming this Court doesn't grant further review, yet two federal judges have decided the prisoner wrongfully incarcerated, while an equal number of federal judges have thought his conviction constitutionally sound. The prisoner by this "unfortuitous" circumstance must serve out his sentence.[19]

Section 2244(c) is a valid exercise of Congressional power. Nothing in the legislative history of the statute indicates that Congress intended any exception for 4-4 affirmances. The Senate Report, *supra*, refers only to denials of certiorari as carrying no presumption that federal rights were actually adjudicated. As stated in a note, *Developments in the Law—Habeas Corpus*, 83 Harv. L. Rev. 1038, 1152 (1970), referring to the language used in §2244(c): "It is clear that 'actually adjudicated' questions of law include all dispositions except denials of certiorari."

B. *Case Law*

The Sixth Circuit cited three cases to support its decision that a 4-4 affirmance by this Court does not represent an adjudication. The cases cited and quoted are *Etting v. United States Bank*, 24 U.S. 57, 76 (1826); *Durant v. Essex Co.*, 74 U.S. 107, 112 (1868); and *Anderson v. Johnson, Warden*, 390 U.S. 456 (1968).

[19] In the Radich federal habeas corpus case, the count now stands at 2-2. The District Judge and one dissenting Second Circuit Judge would have denied relief.

Mr. Chief Justice Marshall wrote for the Court in *Etting v. United States Bank*, *supra*. It was necessary in his opinion only to say that the judges were divided and "Consequently, the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it." *Etting*, *supra*, 24 U.S. at 78.

The Sixth Circuit next quoted from Mr. Justice Field's opinion in *Durant v. Essex Co.*, 74 U.S. 107 (1868). Significantly, the Sixth Circuit *omitted* what is said three paragraphs after the language quoted in their opinion, to wit:

> "The statement which always accompanies the judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. *But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.*" 74 U.S. at 112. (Emphasis added).

The third case relied upon by the Sixth Circuit *Anderson v. Johnson*, 390 U.S. 456 (1968) is not applicable. The per curiam opinion merely stated that the lower court's decision would remain in effect. This language is explained by the fact that none of the eight Justices voted for affirmance—four voted for reversal and four voted to dismiss the writ as improvidently granted.

Not cited by the majority were *United States v. Pink*, 315 U.S. 203, 216 (1942) and *Hertz v. Woodman*, 218 U.S. 205, 213-214 (1910), where in equally divided affirmances, it was emphasized that the decisions were conclusive and binding upon the parties involved, though not authority for subsequent cases. *See also*, *Inman v. Baltimore and O. R.R.*, 361 U.S. 138, 146 (1959) (dissenting opinion of Douglas, J.); *Washington Bridge Co. v. Stewart*, 44 U.S. (3 How.) 413, 424 (1845); and *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (1798).

A 4-4 affirmance in a criminal case historically and logically means the same as it would in any other case. It means the party taking the appeal, against whom there is a presumption of guilt, has failed to carry his burden of convincing the reviewing court that the judgment below should be overturned.

The consideration this Court gave in 1968 to the stationhouse identification is a factual question. The briefs and the transcript of oral argument show that all aspects of the identification were fully considered. The certiorari grant did not limit the question to voice identification, particularly in view of Rule 23 of this Court which says that a statement of a question presented is deemed to include every subsidiary question fairly comprised therein.

2. The stationhouse identification of Biggers was held fairly and scrupulously and not in derogation of his constitutional rights.

Mrs. Beamer was an intelligent, trained nurse. She had been shown many mug shots of suspects, suspects had been to her home, and she had attended police lineups. All these confrontations had been negative.

Once again on August 17, she was asked to look at a suspect. Seated only with an unidentified woman and Capt. McDaniel, she watched Biggers walk past an open door. She identified him by his physical appearance. Naturally, being conscientious, and remembering well the words, "Shut up or I'll kill you," she confirmed the identification by requesting the police officers to have Biggers speak that sentence.

The evidence both at the trial and habeas corpus hearing is uncontradicted that she gave a good description of her assailant.[20] She was able to clearly see her attacker, and the neon lights (R. 13) along the tracks, as well as the full moon (R. 34), illuminated the rapist's features, as did her house lights.[21] Contrary to what the District Court said, there was no conflict between Mrs. Beamer's trial testimony and habeas testimony. (A. 34) The District Court's statement that "there is also conflict between the testimony given by the police officers at the trial and that given by them at the October hearing as to whether or not identification of petitioner was made before or after he was asked to speak these words" is also erroneous. (A. 34) Only three policemen testified at the trial concerning the identification—Officers McDaniel, Smith, and Bailey. McDaniel said she identified him without any hesitation—"That, and she also by voice, yes, sir."[22]

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[20] The District Court erred here (A. 33). Mrs. Beamer gave eight characteristics (A. 123-125).

[21] The District Court erred here (A. 33) when it said, "The entire episode occurred in very dim light and the rape itself occurred in moonlight." Mrs. Beamer looked into Biggers' face in her house (R. 33) enough to identify him. Neon lights were over the tracks also (R. 13, 34).

[22] McDaniel's testimony is somewhat ambiguous. He was never asked at the 1965 trial whether she identified him first by appearance or by voice, but to the extent it can be gleaned from his testimony, she identified him first by appearance (R. 66, 73).

Smith and Bailey said unequivocally she identified Biggers before she heard him speak. (Smith, R. 40; Bailey, R. 79). At the habeas corpus hearing, McDaniel on being asked this question the first time, said Mrs. Beamer identified Biggers before he spoke. (A. 80). Officer Bailey also repeated his trial testimony that Mrs. Beamer identified Biggers prior to his speaking. (A. 134)[23]. McDaniel and Bailey were the only officers who testified at the habeas hearing.

The showup in *Stovall v. Denno*, 388 U.S. 293 (1967) was more suggestive than this one. There three policemen and two prosecutors showed Stovall to the victim in her hospital bed. Contrary to what some have read into the opinion, there is no indication that Mrs. Behrendt's physical condition would preclude a later identification. She later recovered to testify against Stovall, but her hospital bed identification was made while she was seriously ill, in mental or physical anguish, or drugged, or all three. This is quite different from the identification made by Mrs. Beamer, a woman who had over the months viewed many suspects in person singly, in lineups and in photographs calmly and dispassionately.

The showup here was also less suggestive than the one in *Coleman v. Alabama*, 399 U.S. 1 (1970). There, the victim

23 What gives this police testimony the ring of truth, and what has been overlooked, is that when this record was made in 1965 showing unequivocally that Biggers was identified before he spoke, there was no incentive for, the police to shade the facts since it did not make any constitutional difference. A year later Judge Jones wrote in his dissent in **Wade v. United States**: "It follows from the opinion of the majority that it is improper for observers of a crime to see a person suspected or accused of the offense prior to trial. I had no notion that this was prohibited. I do not think it has been previously held that putting a suspect or an accused in a lineup and treating him in the same manner as the others are treated is or may be a violation of a constitutional right." Wade v. United States, 358 F.2d 557, 560-561 (5th Cir. 1966).

Reynolds, on two occasions told the police he was unable to provide much information as to the description of his attackers. His description was "young black males, close to the same age and height." The two turned out to be one 18 and 6'2" and the other 28 and 5'4-1/2". Contrast this with Mrs. Beamer's description which matched Biggers perfectly. In *Coleman*, Reynolds, unlike Mrs. Beamer, didn't communicate his identification until after the defendant spoke. Mrs. Beamer, however, told all the officers right away that this was the man. The time lapse between assault and identification in *Coleman* was two months eight days; in *Biggers*, six months twenty-six days. Reynolds testified that when the police asked him to go to the city jail he "took [it] for granted" that the police had caught his assailants. *Coleman*, *supra*, 399 U.S. at 6. Mrs. Beamer went only to view another suspect, as she had done many times before.

The District Court made five additional errors of fact. They are:

1.

"(T)here is no indication that a truly concerted effort was made to produce suitable subjects for a line-up. Aside from a phone call to the juvenile home and a screening of Metro Jail inmates no other efforts were made." (Order A. 41).

The record shows that Captain McDaniel consulted with Judge Tatum of the Juvenile Court and his superior at the jail. (A. 69-75). It was not possible at such short notice to find someone whose age and size were comparable to Biggers. (A. 72). The District Judge's assertion that "there are several other prison facilities in the area and there is no evidence that any effort was made to screen

them for subjects" (A. 41), overlooks the realities of police practice. The city police have no authority to use people from the State prison for lineups. This was in 1965. Even in 1972 we doubt if local police departments are permitted to go to local prisons to get lineup subject.

The District Court seems also to have forgotten that at the habeas corpus hearing the burden of proof was on Biggers. No proof was offered that one or more unusually large (200 lb.) 16 year old boys may have been available if the police had made the effort. The testimony was *uncontroverted* that the police *did* make the effort and no children of the size of Biggers were available.

2.

"The evidence clearly shows that the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime." (Order A. 41).

This statement of the District Judge has no basis in the record. If by a "good view" the Court means a prolonged look in good lighting, perhaps that statement is valid. Mrs. Beamer said she was able to see him "right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was." (R. 33).

She was with him fifteen minutes or more walking along the tracks under neon lights which hung over the tracks. (R. 13). Her testimony that she could see Biggers in enough light to know who he was is uncontroverted.

3.

"The witness in the instant case was unable to give either an independent photographic identification of the suspect or a good physical description of her assailant." (Order A. 41).

The District Court apparently was under the mistaken impression that Mrs. Beamer was asked to and was unable to give "an independent photographic identification of the suspect." She looked at numerous mug shots, none of which were of Biggers and told the police that none of them was her assailant. Since Biggers had no prior record (his 16th birthday was only four days before he raped Mrs. Beamer, R. 104), the police had no pictures of Biggers.

We respectfully disagree with the District Court's statement that Mrs. Beamer was unable to give a good physical description of her assailant. See the eight characteristics she gave the police. (A. 124-125). Captain McDaniel commented on Mrs. Beamer's description of her assailant: "She gave at that time, on January the 22nd, if I can just glance over this, she might have——." (A. 87). The Court interrupted him and neither the State attorney nor Biggers' attorney pursued it, although it was obvious Captain McDaniel had brought to court and could testify from the police document showing the description Mrs. Beamer had given the night of the rape.

4.

"The hesitancy of the witness in identifying the petitioner." (Order A. 41).

The ***only*** testimony about "hesitancy" on Mrs. Beamer's part came from Officer McDaniel at the trial, who said

she made the identification "without any hesitation." (R. 66). A fair reading of all the officers' testimony is that she identified him at once. Biggers was asked to speak merely for confirmation.

One can imagine a defense attorney's argument of police incompetence if the police had exhibited Biggers to Mrs. Beamer *without* giving him an opportunity for her to hear his voice. It would have been the same as the argument that would have been made in *Stovall* had the police not taken Stovall to the victim's bedside had she not recovered.

Biggers' testimony indicates Mrs. Beamer may have hesitated although in Biggers' testimony it was he who hesitated. When he spoke, he said she nodded her head to identify him. (R. 108). The reason why Biggers' testimony is not necessarily inconsistent with the State's witnesses is that Mrs. Beamer identified Biggers when he was paraded past her. Then Biggers was brought to a face to face confrontation where he was told to speak.

5.

"Mrs. Beamer's knowledge that petitioner was thought by police to be her assailant." (Order A. 41).

Throughout the record all the police as well as Mrs. Beamer testified that she was to look at a "suspect." There is not *one word* in the record that would support a finding that the police thought Biggers to have been her assailant. Remember she had previously looked at mug shots, had suspects brought to her home, and attended numerous lineups.

This conclusion of the District Court that the police had told Mrs. Beamer they thought Biggers was her assailant

is demonstrably and completely without any support in the record, even by inference.

In addition to these five misunderstandings of the record and unsupported conclusions of fact, we have previously mentioned the trial court's finding that Mrs. Beamer changed her story between the trial and the habeas corpus hearing and that the police changed their story to show that she identified him only when he spoke. This is simply an inaccurate reading of the trial record, and we have demonstrated its inaccuracy by citing the names of the witnesses and the pages of their trial testimony which support the opposite conclusion.

This is not a case of the trial judge weighing the credibility of witnesses. All the instances of factually inaccurate conclusions made from the record have been made from an *uncontradicted* record. Conclusions of law premised on such a misunderstanding of the trial record should not be allowed to stand. If the premises are faulty, the conclusion is bound to be faulty.

This case will not fit within the framework of *Palmer v. Peyton*, 359 F.2d 199 (4th Cir. 1966) where the identification was by voice alone. We have no quarrel with *Palmer v. Peyton*. If such a doctrine did not exist it would be necessary to create one. As this Court recently said again in *Kirby v. Illinois*, 406 U.S. ___ (1972), it is possible for a confrontation to be so suggestive as to violate due process. This is not one of those cases.

Dr. Pollack, the expert witness, assumed that Mrs. Beamer's "primary mode of identification was through voice ..." (A. 104). He made that assumption by taking part of Captain McDaniel's testimony out of context (See testimony of McDaniel at R. 66, quoted by Pollack at

A. 104). His conclusions are subject to question because of the mistaken underlying factual assumptions.

This is not a constitutional case involving voice identification alone. A woman of honest repute got a good look at her attacker. She sat calmly in an office in the police station with Captain McDaniel and another woman. Two officers brought the defendant in her view. Without hesitating she made a positive identification. She was even more certain when she heard him speak. No one suggested to her "this is the man."

The error of the District Court below in misreading the 1965 trial record and in ignoring the uncontradicted habeas corpus testimony was not of law but of fact. Since the premises of fact are contradicted by the record, the conclusions of law should be re-examined. The record shows the identification was fairly conducted.

CONCLUSION

The judgment of the Sixth Circuit should be reversed and the petition for the federal writ of habeas corpus dismissed.

Respectfully submitted,

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